United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 08-1119**
	)	**Issued: May 13, 2009**
DEPARTMENT OF THE NAVY, ROICC, SAN FRANCISCO BAY AREA, Oakland, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 5, 2008 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs dated December 6, 2007 and February 27, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office used the proper pay rate in calculating appellant's compensation benefits beginning February 2, 1989; and (2) whether the Office properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 2, 1989 appellant, then a 33-year-old support services specialist, filed a Form CA-2, occupational disease claim, alleging that employment factors caused stress-related illnesses. She also filed a Form CA-7 claim for compensation for intermittent periods beginning February 2, 1989. At that time appellant was a GS-7, step 6, with an annual salary of

$22,743.00. She received a within grade increase to GS-7, step 7, effective June 4, 1989, with an annual salary of $23,393.00. Appellant's leave record for 1989 indicates that her last day at work was September 27, 1989. She did not return to work. On March 1, 1990 the Office accepted that appellant sustained employment-related depression. Appellant was placed on the periodic rolls, effective September 29, 1989, based on the February 2, 1989 pay rate of $22,743.00.

By letter dated December 1, 2001, appellant stated that her benefits should be recalculated because she received a step increase in June 1989. In a December 31, 2001 response, the Office informed appellant that her pay rate was correctly based on the February 2, 1989 pay rate, the date disability began.

By decision dated May 17, 2006, the Office terminated appellant's compensation benefits on the grounds that her treating physician, Dr. Charles Covert, a Board-certified psychiatrist, advised that she no longer had residuals or psychiatric work restrictions.[1]

By letter dated September 24, 2007, appellant contended that she had been paid at an incorrect pay rate because she received a within grade increase from GS-7, step 6 to GS-7, step 7 on June 4, 1989. She attached the December 2001 correspondence and SF-50, notification of personnel action, forms showing that on June 4, 1989 she received a within grade increase from a step 6 to a step 7 and on January 13, 1991 a locality pay increase.

By letter dated September 24, 2007, the employing establishment noted the above pay adjustments and advised that a Form CA-7 claim form was attached.[2] On October 12, 2007 the Office referred appellant to its December 31, 2001 correspondence regarding the effective pay rate, and advised her that her wage-loss compensation was based on the correct pay rate. On October 25, 2007 appellant requested that the Office issue a formal decision on the matter of her pay rate. In an October 26, 2007 letter, she again requested that her compensation be adjusted. Appellant provided a list of days missed from work from February 2 through September 27, 1989.

In a December 6, 2007 decision, the Office found that the February 2, 1989 pay rate used to compute appellant's compensation benefits was correct and denied her claim for a compensation adjustment.

On December 13, 2007 appellant requested reconsideration, arguing that her pay should be adjusted. By decision dated February 27, 2008, the Office denied her reconsideration request.

[1] Appellant pursued numerous reconsideration requests regarding the termination before the Office and currently has an appeal before the Board on that issue. That appeal, Docket No. 08-1242, will be adjudicated separately.

[2] The CA-7 claim form is not found in the case record.

LEGAL PRECEDENT

Section 8101(4) of the Federal Employees' Compensation Act[3] defines "monthly pay" for purposes of computing compensation benefits as follows: the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.[4] In an occupational disease claim, the date of injury is the date of last exposure to the employment factors which caused or aggravated the claimed condition.[5]

ANALYSIS

The Board finds that the Office erred in determining the effective pay rate for compensation purposes. The Office used the pay rate in effect on February 2, 1989, the date appellant began losing time for her accepted emotional condition, which was the date disability began. Since appellant only worked intermittently, until she stopped work in September 1989, she did not work at her regular job for a period of six months after February 2, 1989. She would therefore not be entitled to a recurrent pay rate.[6] Therefore, the proper pay rate would be either the date of injury or the date disability began.

The record supports appellant worked sporadically after February 2, 1989. She continued to perform her regular job duties in her regular position.[7] Appellant therefore continued to be exposed to the employment factors that were accepted by the Office as causing her employment-related depression. The date of injury is the date of the last exposure that adversely affects the condition because every exposure that has an adverse effect (an aggravation) constitutes an injury.[8] Appellant's leave records show that the date of last exposure was September 27, 1989 which would be the date of injury. As she received a within grade increase from GS-7, step 6 to GS-7, step 7 effective June 4, 1989, her pay rate for compensation purposes should have been based on the GS-7, step 7 salary or $23,393.00, as it was greater than the step 6 salary of $22,743.00. In applying section 8101(4), the statute requires the Office to determine monthly

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8101(4); *see Dale Mackelprang*, 57 ECAB 168 (2005).

[5] *R.S.*, 58 ECAB ____ (Docket No. 06-1346, issued February 16, 2007).

[6] A recurrent pay rate applies only if the work stoppage began more than six months after a return to regular full-time employment. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5a(4) (December 1995).

[7] An accepted factor of employment was that appellant was harassed by her supervisor.

[8] *Patricia K. Cummings*, 53 ECAB 623 (2002). The Board's analysis in a schedule award situation appears equally applicable in a claim of occupational disease for a condition produced over a period longer than a single workday or shift. *See* 20 C.F.R. § 10.5(q).

pay by determining the date of the greater pay rate.[9] The case will be remanded to the Office to recalculate appellant's compensation as of September 27, 1989.[10]

CONCLUSION

The Board finds that the Office improperly calculated appellant's pay rate for compensation purposes.[11]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 27, 2008 and December 6, 2007 be vacated and the case remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: May 13, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[9] *Supra* note 4.

[10] Appellant, however, would not be entitled to a pay rate based on the January 13, 1991 pay increase because she stopped work in 1989. There is no provision which entitles a claimant to receive additional compensation for grade and step increases which the employee might have received if he or she had remained in his or her position with the employing establishment and the probability that an employee, if not for a work-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation. *E.G.*, 59 ECAB ___ (Docket No. 07-1562, issued July 2, 2008).

[11] As the Board is remanding the case based on the first issue, the second issue is moot.